



IT IS ORDERED as set forth below:

James E. Massey

Date: April 2, 2014

James E. Massey
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

_____|
IN RE: CASE NO. 12-58761

Harold A. Shaw,
CHAPTER 7

Debtor. JUDGE MASSEY

_____|

Harold Shaw,

Plaintiff,

v.

ADVERSARY NO. 12-5353

State of Georgia, et al.,

Defendants.

_____|

**ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
AND GRANTING JUDGMENT FOR PLAINTIFF**

In 2009 and 2010, the Georgia Department of Labor offset a tax refund otherwise due to Plaintiff Harold Shaw and applied the refund to unemployment taxes, including interest, owed to the Department of Labor by American Power, Inc., which had employed Mr. Shaw. On April 12,

2012, Mr. Shaw filed a Chapter 7 bankruptcy under Case No. 12-58761, and he represents himself. On July 10, 2012, acting pro se, he filed a complaint, entitled “Request for Injunction or Relief from Collection,” commencing this adversary proceeding. He seeks to enjoin the Defendants, which include the State of Georgia, the Commissioner of the Georgia Department of Labor and the Georgia Department of Revenue, from continuing efforts to collect from him taxes owed by American Power. Mr. Shaw received a discharge on January 16, 2013. The Court interprets Mr. Shaw’s complaint as one seeking the determination of the dischargeability of any debt he may owe for unemployment taxes.

In their answer to the complaint Defendants denied its allegations and asserted the affirmative defense of sovereign immunity.

Defendants moved for summary judgment on March 15, 2013. They contend that American Power failed to pay some or all unemployment taxes for the last three quarters of 2007, for all four quarters of 2008 and for the first two quarters of 2009. They further assert that Mr. Shaw is liable for tax debt owed by American Power pursuant to O.C.G.A. §34-8-167(e), which provides in part that such debt is the “personal debt of the officer, major stockholder, or other person having charge of the affairs of a corporate or association employing unit who is required to file returns or pay the contributions required by this chapter.”

Defendants further argue that the debt allegedly owed by Mr. Shaw for unpaid unemployment taxes is not dischargeable pursuant to 11 U.S.C. §§ 523(a)(1)(A) and 507(a)(8)(C) and (D).

Mr. Shaw denies he was an officer of American Power but acknowledges that he was the office manager of American Power. He contends that American Power paid all of the taxes due

and that he was assured by employees of the Department of Labor that all unemployment taxes had been paid.

For the reasons stated below, the Court holds that the contributions (taxes) that O.C.G.A. § 34-8-150(a) requires employers such as American Power to make to Georgia's Unemployment Compensation Fund, do not constitute a "tax required to be collected or withheld" within the meaning of section 507(a)(8)(C) of the Bankruptcy Code. Section 507(a)(8)(D) applies only to unemployed taxes on wages "earned from the debtor." Because Mr. Shaw was not the employer, that subsection is inapplicable to the facts here. Hence, Mr. Shaw is entitled to a judgment that the debt he owes to the Georgia Department of Labor is dischargeable.

Because Mr. Shaw received a discharge in his Chapter 7 case, section 524 of the Bankruptcy Code enjoins any act to collect from Mr. Shaw as his personal liability the debt of American Power for unemployment taxes, interest and penalties with respect to wages paid by American Power.

This Court has jurisdiction of this matter pursuant to 28 U.S.C. §§ 1334 and 157, and this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I) and (O).

I. Facts.

The following facts are not in dispute, except as noted.

A. Mr. Shaw's Role at American Power.

In his motion to dismiss, Plaintiff Harold Shaw stated that upon joining American Power, Inc. in 2005, the business had no employees and was "\$40,000 in the whole (sic)" and that he turned the business around "through a lot of footwork and phone calls," spending "many long days and evenings up to 70 hours a week to build American Power Inc. Staffing . . . totally alone

while not receiving a paycheck until around May or June 2006.” Plaintiff’s Motion to Dismiss Proof of Debt, Doc. No. 12, p. 2. In a response to an interrogatory posed by Defendants, Mr. Shaw stated that in May or June 2006, he went on the payroll as “Office Manager who would oversee any operations with American Power Inc. Staffing.” Plaintiff’s Discovery Responses, Doc. No. 29, p. 2.¹ He remained with the company until December 2009. *Id.* at p. 7. It is not disputed that American Power provided temporary personnel who were its employees to other companies and that it was subject to the provisions of the Georgia Employment Security Law, O.C.G.A. § 34-1-1, et seq.

In his response to Interrogatory 8 seeking a description of his duties and responsibilities, Mr. Shaw stated:

As an Office Manager, my job description was like any other Office Manger. Take care of the office and manage it according to instructions. Plaintiff conducted interviews with some job applicants. Other times an office assistant would conduct the interviews, especially if they were women. Manage the clientele and try to solicit new business. All operations with regard to management was plaintiff’s responsibilities. Design policies and procedures. Communicate with vendors and company clients, otherwise known as employers. Called clients if payments were delinquent to manage accounts according to Mr. Tran’s instructions, handle employee concerns, at times conducted interviews with outside individuals when needed for employee concerns, make decisions to release employees for many different reasons. Also had the final decision to hire or not hire potential employees. Processed marketing tools needed to give employers knowledge of who American Power Inc. was and what we could offer their company in terms of service.

Id. at pp. 6-7.

¹ His answers to interrogatories were not under oath.

In response to Interrogatory 14 concerning Mr. Shaw's involvement with bookkeeping and/or accounting of American Power Inc., during the period from January 1, 2006 through December 31, 2009, Mr. Shaw stated:

There was only a Pennsoft Program which Mr. Tran showed plaintiff how to work with, and it allowed him to be in constant touch with his office. The program kept a list of active employees, as well as inactive employees, and employees that had signed on with companies or was terminated.

Id. at p. 10.

In response to Interrogatory 15 concerning Mr. Shaw's involvement with respect to issuing payroll and vendor checks of American Power Inc., during the period from January 1, 2006 through December 31, 2009, he stated:

Issuing payroll was a matter of collecting the time cards and entering employees names and time worked. The Pennsoft program was a sophisticated system that calculated the payroll and deductions. Once that information was entered on Monday, Mr. Tran could see it as he always kept an eye on his money. He did know plaintiff very long but was impressed with his honesty. If Mr. Tran saw a problem he would always contact plaintiff.

Id. at pp. 10-11.

In response to Interrogatory 5 concerning preparation of tax returns, Mr. Shaw stated:

The Quarterly Wage and Tax reports were handled by the plaintiff, and the information regarding such tax returns were cleared with the Arizona office, and monitored by Mr. Tran.

Id. at p. 5.

In his response to Interrogatory 6 concerning bank accounts and signature authority, Mr. Shaw stated:

One person had signature authority over all bank accounts to his company. John Tran, and he made that plain. For convenience he allowed plaintiff to be a co-signor as Mr. Tran travels a lot.

Id. at p. 5.

In his response to Defendants' Interrogatory 3 asking for the names, addresses and telephone numbers of each person who was an officer of American Power Inc. from January 1, 2006 through December 31, 2009, Plaintiff stated:

Plaintiff contacted an affiliate of American Power Inc. at times to get in touch with Mr. Tran. Plaintiff did not have a relationship with the employees there and only knew one by name which was Nicole. The telephone number for anyone at that location has been disconnected. Each location operated as its own corporation.

Id. at pp. 3-4.

Defendants contend in their motion for summary judgment that Mr. Shaw was an officer of American Power.² Motion for Summary Judgment, Doc. No. 33, pp. 4-5. In a request to admit, a copy of which was attached to a supplemental brief filed on June 26, 2013, Defendants requested Mr. Shaw to admit that he was "an officer of American Power, Inc. during the period from January 1, 2006 through December 31, 2009." Defendants' Supplemental Brief, Doc. No. 47, Part 2, Exhibit, p. 8. There is no certificate of service attached to that Discovery Request.

In the Supplemental Brief, Defendants argue that "Defendants properly served Plaintiff with requests for admissions on January 15, 2013, by mailing the requests for admission to his given address on January 15, 2013." Defendants' Supplemental Brief, Doc. No. 47, Part 1, pp. 4-5. In a letter to Mr. Shaw dated February 20, 2013, Defendants' counsel wrote that the "Defendants served" Requests to Admit on Mr. Shaw on January 15, 2013 and that he failed to respond. Letter to Debtor, Doc. No. 23. But the assertion that the Requests to Admit were

² Defendants' counsel confirmed at the hearing held in this adversary proceeding on January 31, 2014 that Defendants contend that Mr. Shaw is liable under O.C.G.A. § 34-8-167(e) for unpaid unemployment taxes owed by American Power even if he was not an officer.

served on January 15, 2013 is not supported by an affidavit or a certificate of service and is not a substitute for proof of service. Mr. Shaw filed his responses on March 3, 2013 and denied he was an officer. Plaintiff's Discovery Responses, Doc. No. 29, pp. 11-12.

In his affidavit as amended, Donald Newton asserted that "[t]he records of the Department reflect that Harold Shaw was a responsible corporate officer for American Power, Inc., as he signed the Quarterly Tax Reports, and signed the employment tax checks on behalf of American Power, Inc." Amended Affidavit of Donald Newton, Doc. No. 68, Part 1, p. 2. Mr. Newton further swore that "[t]he returns and checks were signed by the Plaintiff in his capacity as the Chief Financial Officer of American Power, Inc." *Id.* at 3. That is simply not true. Mr. Shaw signed the returns as "Office Mgr." or without any designation of job title, *Id.*, Part 2, pp. 4-8, and the checks do not state his capacity. *Id.*, Part 3, pp. 2-9. Neither signing a corporate tax return nor signing a corporate check proves that the person signing was an officer of the corporation.

The contention that Mr. Shaw was an officer of American Power is also based on annual reports filed with the Secretary of State, copies of which were attached to a supplemental brief. Defendants' Supplemental Brief filed on June 26, 2016, Doc. No. 45. A peek at the annual report filed by American Power, Inc. dated January 2, 2009 on the website of the Georgia Secretary of State would show that Mr. Shaw is listed as an officer and purportedly signed the report. A peek online at the amended annual report for 2009 dated July 31, 2009 would show that as of that date Mr. Shaw was no longer listed as an officer and that he purportedly signed that report. But those reports are not self-authenticating and do not prove that Mr. Shaw was the person who in fact filed them or that they are accurate.

Nonetheless, it is not necessary for Mr. Shaw to have been an officer of American Power in order to be liable for American Power's debt for unpaid unemployment taxes under O.C.G.A. § 34-8-167(e). The Court finds that Mr. Shaw's own admissions in documents he filed in this adversary proceeding prove that he was the "person having charge of the affairs of [American Power]" and who "[was] required to file returns or pay the contributions." Below each of his signatures on the paper quarterly reports he filed on behalf of American Power with the Department of Labor were the words "Signature and title of the *individual responsible for the information provided.*" (Emphasis added.) Mr. Shaw contends that he had to clear everything with a Mr. John Tran, who apparently owned American Power. But those statements, even if they had been made under oath, do not show that only Mr. Tran was responsible for filing the returns and causing American Power to pay the taxes and do not contradict Mr. Shaw's descriptions of his duties and actions, which are more than sufficient to show that he was the person responsible for filing returns and paying the unemployment taxes.

B. Unpaid Unemployment Taxes Owed by American Power.

Defendants submitted the amended affidavit of Donald Newton, Assistant Chief of Unemployment Insurance Tax Administration, to show the quarterly reports filed by American Power Inc., the amounts owed with respect to each such report and an analysis of application of payments to the debt. Amended Affidavit of Donald Newton, Doc. No.68. Exhibit A to Mr. Newton's affidavit are copies of paper quarterly reports (returns) filed by American Power, which Mr. Shaw filled out, physically signed and filed with the Department of Labor. Those reports covered the second, third and fourth quarters of 2006, and all four quarters of 2007. *Id.*, Part 2, Exhibit A, pp. 2-8. The raw data of employee wages and calculations of taxes incurred in

quarter of 2008 are also shown in Exhibit A. *Id.*, pp. 9-13. Mr. Shaw filed electronically each of the quarterly reports for 2008 and the first quarter of 2009, as reflected in the records of the Department of Labor. *Id.*, Part 4, Exhibit C. Mr. Shaw accessed the electronic filing system for unemployment taxes through the use of a password, as reflected in Exhibit D to Mr. Newton's amended affidavit. *Id.*, Part 5.

American Power, Inc. made payments on its tax obligations to the Department of Labor in 2007, 2008 and 2009 by seven (7) checks signed by Mr. Shaw and drawn on its bank account at Bank of America. *Id.*, Part 3, Exhibit B, pp. 2-11. The first check, No. 1276 dated November 30, 2007 in the amount of \$2,394.15 (*Id.* at p. 2) paid substantially all of the outstanding taxes, interest and penalties due with respect to the second and third quarters of 2006. *Id.*, Part 6, Exhibit E, p. 2. Mr. Shaw admitted that he had "the responsibility to sign checks for Mr. Tran, because Mr. Tran lives out of the United States from last known contact" [because] "Mr. Tran was or is a resident of Korea and could not facilitate the actions needed to operate a staffing business." Plaintiff's Response to Affidavit of Donald Newton, Doc. No. 54, pp. 1-2.

The Department of Labor obtained other funds to pay down the debt of American Power, Inc. by levying on bank accounts of American Power and by intercepting tax refunds of Mr. Shaw. Amended Affidavit of Donald Newton, Doc. No. 68, Part 6, Exhibit E, p. 4. The allocation of each check and of funds obtained by levy and interception of tax refunds to the outstanding debts are shown on page 5 of Exhibit E of Mr. Newton's amended affidavit.

The Statement of Account Balance, *Id.*, shows the balance due on the debt of American Power, Inc. to the Department of Labor through February 10, 2014 for unemployment taxes, interest and penalties was \$22,736.42. That balance includes \$729.10 for the first quarter of 2009

and \$123.07 for the second quarter of 2009. An employee of the Department of Labor prepared the return for the second quarter of 2009. The computation of taxes due used the data of taxable wages that American Power electronically filed, thereby informing the Department of Labor the amount of wages it paid in the second quarter of 2009. Amended Affidavit of Donald Newton, Doc. No.68, Part 2, Exhibit A, pp. 13-14.

B. Mr. Shaw's Contention That All Taxes Were Paid.

Mr. Shaw contends that all taxes owed by American Power were paid, but he failed to produce any evidence to support his contention. In an Order and Notice to Plaintiff Concerning Defendants Motion for Summary Judgment and Deadline for Filing a Response filed on June 28, 2013 and served on Mr. Shaw by the Clerk on June 30, 2013, the Court notified Mr. Shaw concerning his obligation to file responses and meet deadlines if he desired to oppose the Defendants' motion. That Order and Notice informed Mr. Shaw, among other matters, as follows:

To dispute a material fact that Defendants contend is true, Plaintiff must explain which facts asserted by Defendants in their Statement of Material Facts Plaintiff disputes. Plaintiff must also attach to his response to the motion for summary judgment all materials supporting that response, including depositions, answers to interrogatories, admissions on file (these items, which are discovery materials, may not exist in this case - the court would not know because parties are not required to file them), affidavits, and any other relevant materials that Plaintiff wishes the Court to consider in opposition to the motion for summary judgment. Fed. R. Civ. P. 56(c), made applicable by Bankruptcy Rule 7056.

Order and Notice, Doc. No. 48, p. 3. Mr. Shaw never filed an affidavit or presented any evidence whatsoever. Instead, he made unsworn statements of facts and arguments in various documents filed with the Court. In particular, he never provided any evidence to show that the underlying

employee wage data for 2008 and 2009 as shown on Exhibit A to the Amended Affidavit of Donald Newton, Doc. No. 62, Exhibit A, Part 2, pp. 9-13, was incorrect.

Referring to the seven checks payable to the Department of Labor that he signed, Mr. Shaw contends that "Payments made to the Georgia Department of Labor in full was made to Sabrina West, Tax Audit Manager." Plaintiff's Motion to Dismiss Proof of Debt, Doc. No. 12, p. 5. His argument is unsupported by any evidence other than with respect to the amounts shown on checks he produced, copies of which were also attached to Mr. Newton's amended affidavit. The evidence shows these payments were applied to the debts for the respective quarters each check referenced.

Mr. Shaw misses the point that American Power paid taxes late, if at all. O.C.G.A. § 34-8-166(a) provides that "[c]ontributions unpaid on the due date established by the Commissioner shall bear interest at the rate of 1.5 percent per month or any fraction of a month. Interest shall continue to accrue until all amounts due, including interest, are received by the Commissioner." Four of the checks drawn on American Power's bank account to pay taxes for the four quarters of 2007 were dated September 29, 2008 or September 30, 2008. The bulk of the outstanding debt is interest on unpaid taxes.

Mr. Shaw also asserted that Greg Maye, an employee of the Department of Labor, "was engaged in tampering with state records and conspiracy, both being known facts and documented in the records of a court proceeding that was recorded, and copies of that proceeding is (sic) in the possession of the State of Georgia by way of Sabrina West" (another Department of Labor employee). Response to Defendants' Objection to Plaintiff's Exhibit List. Doc. No. 36, p. 2. Plaintiff provided, however, no evidence in the form of an affidavit or otherwise to show that Mr.

Maye's alleged misconduct resulted in any overstatement of American Power's unemployment tax liability.

II. Conclusions of Law.

A. Liability.

Defendants contend that Mr. Shaw is liable for the contributions, interest and penalties that American Power was required to pay but failed to pay for the last three quarters of 2006, 2007, 2008 and the first two quarters of 2009. O.C.G.A. § 34-8-167(e) provides:

(e) All contributions, including interest, penalties, and costs thereon, imposed by this chapter are made a personal debt of the officer, major stockholder, or other person having charge of the affairs of a corporate or association employing unit who is required to file returns or pay the contributions required by this chapter. The Commissioner may assess such officer, stockholder, or other person for the amount of such contributions, penalties, and interest. The provisions of Code Section 34-8-164 and Code Section 34-8-170 shall apply to assessments made pursuant to this subsection. With respect to such officer, stockholder, or other person, the Commissioner shall have all the collection remedies set forth in this chapter.

This Court has found no published decision by a Georgia court or other court interpreting O.C.G.A. § 34-8-167(e), which was enacted in 1992. The statute it replaced was O.C.G.A. § 34-8-128, which provided in relevant part: "(a) All contributions or taxes under this chapter are made a personal debt of the person required hereunder to file the returns or to pay the taxes imposed hereby." O.C.G.A. § 34-8-128 (1988). This statute was a re-enactment of Georgia Code Annotated § 54-650.2, which contained identical language with regard to the liability of an individual.

In *Brumby v. Brooks*, 234 Ga. 376 (1975), the only published Georgia case dealing with any of these three statutes, the Supreme Court held that the language of Ga. Code Ann. § 54-650.2 was "sufficiently certain and definite to inform a person of normal intelligence, in the

class upon which the statute operates, of the meaning of the statute.” *Id.* at 381. Reversing the court below, the Court determined that the corporation’s president, who had claimed to be a figurehead with no responsibility for managing the corporation, was entitled to a trial on the issue of whether he was a responsible person under the statute. In so ruling, the Supreme Court opined that

[a] reasonable and logical construction of this statute is that the legislature intended that § 54-650.2 fix personal liability for the tax on the officer or employee of the employing unit who has the duty to see that the taxes are paid and who is, therefore, responsible for the employer's failure to pay the tax.

Id. at 380.

The language of O.C.G.A. § 34-8-167(e) echos the construction of § 54-650.2 in *Brumby*. Its plain meaning places liability to pay the tax on a person in charge of the employer’s affairs “who is required to file returns or pay the contributions.”

Mr. Shaw has admitted facts that prove he was the responsible person for filing the unemployment returns and paying the taxes. His own description of his job shows that he was in charge of America Power’s business in Georgia. He alone built the business of American Power in Georgia. He hired or supervised the hiring of employees, had the authority not to hire an applicant and to “release” employees, solicited business for American Power from other companies, handled the payroll, was the only person other than John Tran who had authority to sign checks on America Power’s bank account, physically signed and filed the returns for 2006 and 2007 as the “individual responsible for the information provided,” electronically signed and filed the returns for 2008 and 2009, and signed the checks paying portions of taxes and interest due for certain quarters in those years. These facts show that he was the “person having charge

of the affairs of a corporate or association employing unit who is required to file returns or pay the contributions” owed by American Power.

In an effort to exculpate himself, Mr. Shaw asserted in numerous documents filed in this proceeding that Mr. Tran reviewed everything he did and that he consulted with Mr. Tran before signing checks. These contentions were not made under oath, but even if they had been, they do not contradict Mr. Shaw’s admissions that he was the person at American Power who ultimately had the responsibility for filing returns and paying the unemployment taxes. At best his contentions show that he believed that Mr. Tran could have prevented him from filing returns and paying taxes. There is no evidence that Mr. Tran ever prevented Mr. Shaw from paying the taxes. The possibility of veto power does not negate the fact that Mr. Shaw had the responsibility to file those returns and to pay the unemployment taxes.

B. Dischargeability.

The Court is treating Mr. Shaw’s complaint as one seeking the determination of the dischargeability of any debt he may owe to the Department of Labor for unemployment taxes owed by American Power. Defendants assert that the debt owed by Mr. Shaw for unpaid employment taxes, interest and penalties is not dischargeable under sections 523(a)(1)(A) and 507(a)(8)(C) and (D) of the Bankruptcy Code.

Section 523(a)(1)(A) provides:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--

(1) for a tax or a customs duty--

(A) of the kind and for the periods specified in section 507(a)(3) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed[.]

Section 507(a) of the Bankruptcy Code deals with the priority of claims with respect to payment in bankruptcy cases, but for the purpose of section 523(a)(1)(A), section 507(a)(8) describes the kinds of taxes that are not dischargeable. The subsections of section 507(a)(8) on which Defendants rely provide:

(a) The following expenses and claims have priority in the following order: . . .

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for-- . . .

(C) a tax required to be collected or withheld and for which the debtor is liable in whatever capacity;

(D) an employment tax on a wage, salary, or commission of a kind specified in paragraph (4) of this subsection earned from the debtor before the date of the filing of the petition, whether or not actually paid before such date, for which a return is last due, under applicable law or under any extension, after three years before the date of the filing of the petition[.]

No other subsection or paragraph in section 507 is relevant to the dischargeability of a debt for unpaid unemployment taxes.

1. Section 507(a)(8)(C).

The dischargeability of the debt owed by Mr. Shaw to the Department of Labor turns on the meaning of the phrase “a tax required to be collected or withheld” in section 507(a)(8)(C).

The relevant state statute is Georgia’s Employment Security Law, O.C.G.A. § 34-8-1 et seq.

The Employment Security Law defines the term “contributions,” as “the money payments to the Unemployment Compensation Fund required by Code Sections 34-8-150 through 34-8-156.”

The first question to be addressed is whether such a contribution is a tax.

The word “tax” is rarely used in the Employment Security Law, but it is clear that a contribution under these statutes is a tax. For example, O.C.G.A. § 34-8-168(a) provides that the

Commissioner “may use garnishment to collect the tax imposed by this chapter.” In *Caldwell v. Hospital Authority of Charlton County*, 248 Ga. 887, 890, 287 S.E.2d 15, 18 (1982), the Georgia Supreme Court opined that “[c]ompulsory contributions for employment security are like many other taxes; they are payable without regard to fault.”

The second area of inquiry in interpreting section 507(a)(8)(C) is the source of the requirement that an entity collect or withhold a tax. Defendants assert that Mr. Shaw was required to collect unemployment taxes from American Power itself. But they do not identify the entity that allegedly had the power to require him to do so for purposes of section 507(a)(8)(C), although perhaps their contention, reading between the lines, is that Mr. Shaw was somehow required to collect the tax from American Power merely because he was responsible for seeing to it that it paid the tax. This Court believes that a governmental unit is the only entity that, for purposes of section 507(a)(8)(C), could require a corporate entity or individual to collect from another person or entity a tax owed by that other person or entity. As explained below, a tax covered by this section is a “trust fund” tax held for the benefit of the taxing authority until remitted. Only a statute could create or authorize an entity other than the taxpayer to take possession of and remit the tax because once the tax is “collected” by the remitter, it would follow that the taxpayer paying the tax to the remitter would have satisfied its tax liability.

The final inquiry is whether the Georgia Employment Security Law requires anyone to collect or withhold unemployment taxes. The Georgia Employment Security Law contains no provision requiring an employer or its employees to collect an unemployment tax from another entity or person or requiring or authorizing employees to collect unemployment taxes from their

employer. The unemployment tax is a general obligation of the employer measured by the amount of taxable wages it pays to its employees. O.C.G.A. § 34-8-150(a).

By contrast, Georgia's sales tax law requires collection of a tax. It makes every purchaser of tangible personal property at retail liable for a tax at 4% of the purchase price, makes the tax payable to the retailer making the sale, and makes the retailer "liable for a tax on the sale at a rate of 4% of the sales price, or the amount of taxes *collected* by him from his purchaser or purchasers, whichever is greater." O.C. G. A § 48-8-30(b)(1) (emphasis added).

The additional 4% of the purchase price paid by the purchaser are taxes at the moment those funds are received by the retailer. But an employer could pay the unemployment tax out of general revenues, tax refunds, lottery winnings, money found on the sidewalk that does not escheat to the state, gifts, loan proceeds or money trees if there were any. Funds that are ultimately used to pay unemployment taxes are not taxes but rather are the means to pay the taxes due. Defendants' argument is therefore absurd. It makes no more sense to say that funds available to pay unemployment taxes are taxes waiting to be paid, which seems to be Defendants' argument, than it would be to argue that money in a company's bank account that could be used to be its debt for income taxes constitutes income taxes.

Withholding taxes are those taxes owed by a taxpayer but withheld by another entity – usually an employer. “[W]ithholding taxes are distinguished from taxes directly incurred by the debtor,” *Begier v. U.S., I.R.S.*, 878 F.2d 762, 771 (3rd Cir. 1989) and are generally regarded as “trust fund” taxes. The Employment Security Law contains no provision requiring employers or their employees to withhold unemployment taxes from funds due to another person and explicitly forbids deducting contributions from the wages of employees. O.C.G.A. § 34-8-180(c).

Section 507(a)(8)(C) applies only to "trust fund" taxes – taxes owed by one person or entity that another entity is required by law to collect or withhold until remitted to the taxing authority. *In re Calabrese*, 689 F.3d 312, 316 (3d Cir. 2012) cert. denied, 133 S. Ct. 867, 184 L. Ed. 2d 659 (U.S. 2013); *In re Hansen*, 470 B.R. 535, 544 (9th Cir. B.A.P. 2012); *In re Mosbrucker*, 227 B.R. 434 (B.A.P. 8th Cir. 1998) aff'd, 198 F.3d 250 (8th Cir. 1999); see 4 COLLIER ON BANKRUPTCY § 507.11[4] (16th ed. 2010); NORTON BANKRUPTCY LAW AND PRACTICE 3D , §49:53 (2014) ("Code § 507(a)(8)(C) accords eighth-priority status to the so-called "trust fund" taxes.")

In *Hansen*, the Bankruptcy Appellate Panel of the Ninth Circuit affirmed the holding of the bankruptcy court that unpaid unemployment insurance taxes were not the kind of taxes specified in § 507(a)(8)(C). The California Employment Development Department ("EDD"), the appellant, contended that the unemployment tax for which the debtor was liable was a tax required to be collected within the meaning of section 507(a)(8)(C) because the EDD was required by state law to collect it. The Appellate Panel disagreed. It opined that section 507(a)(8)(C) was ambiguous on the question of whether a duty imposed by state law on a taxing authority to collect taxes satisfied that section. The court then reviewed legislative history and concluded that Congress intended that the tax described in that section "must be collected from a third party." *Id.* at 544. If it meant what the EDD argued, taxes of every stripe would be nondischargeable under that section without regard to the passage of time, which would make other subsections of section 508(a)(8) superfluous.

Defendants cite *In re Haas*, 162 F.3d 1087 (11th Cir. 1998) ("*Haas III*") as support for their contention that the contributions under the Employment Security Law are taxes "required to

be collected" as contemplated by § 507(a)(8)(C).³ In doing so, they rely on a single sentence that reads: "Employment taxes (also referred to as trust fund taxes) refer to taxes the debtors were supposed to withhold for income taxes and social security, the employer's share of social security taxes and unemployment taxes owed by an employer." *Id.* at 1088-89. Based on this one sentence, they contend that the *Haas III* court "determined that employment taxes, including those owed by an employer, are trust fund taxes under U.S.C.A. § 7501(a) and entitled to priority under 11 U.S.C. § 507(a)(8)(C)." Defendants' Supplemental Brief, Doc. No. 74, p. 3. That conclusion is incorrect.

First, the sentence is ambiguous. The ambiguity arises because of the inherent conflict between the placement of the parenthetical immediately after the subject of the sentence and the Court's reference to 26 U.S.C. § 7501(a) a few lines later on the same page. The Court noted that "Employment taxes are, however, priority claims. 11 U.S.C. § 507(a)(8)(C) (1993). Under 26 U.S.C.A. (I.R.C.1954) § 7501(a), they are considered to be in a special fund in trust for the United States." *Id.* at 1089. Section 7501(a) provides:

(a) General Rule, --Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose.

³ In this case, the Internal Revenue Service appealed the judgments below confirming the debtors' Chapter 11 plan. Prior litigation in the case resulted in two earlier decisions by the Eleventh Circuit, which are cited in the opinion. *Haas III* cannot be reliably summarized in one sentence taken out of the context of the law and the facts.

The Federal Unemployment Tax Act, 26 U.S.C. § 3301, et seq., which undoubtedly imposed the unemployment taxes referred to in *Haas III*, does not require an employer to withhold or collect from any other person the tax imposed in that Act. *In re Preferred Door Co., Inc.*, 990 F.2d 547, 550 n.3 (10th Cir. 1993). An employer is also not required to collect or withhold its share of social security taxes. *Matter of Avildsen Tools & Machine, Inc.*, 794 F.2d 1248, 1250 n.1 (7th Cir. 1986). Consequently, unemployment taxes and the employer's share of social security taxes are not "trust fund" taxes under section 7501(a). It follows that the parenthetical "(also referred to as trust fund taxes)" applied only to the employment "taxes the debtors were supposed to withhold for income taxes and social security."

This interpretation of the sentence in question reconciles the *Haas III* decision with an earlier decision by the Court of Appeals in the same case, *In re Haas*, 48 F.3d 1153, 1159-60 (11th Cir. 1995), abrogated on other grounds by *In re Griffith*, 206 F.3d 1389 (11th Cir. 2000). ("*Haas II*")

Haas II arose out of the same Chapter 11 case that gave rise to *Haas III*. In *Haas II*, the IRS objected to the discharge of income and unemployment taxes owed by Mr. Haas. The primary issue on appeal was "whether a debtor "willfully attempt[s] in any manner to evade or defeat [a] tax," for the purposes of 11 U.S.C. § 523(a)(1)(C), when the debtor intentionally fails to pay taxes for which he or she properly filed tax returns and acknowledged were owed to the Internal Revenue Service ("IRS"). *Id.* at 1153. Mr. Haas argued that if the mere failure to pay a tax was sufficient to make it nondischargeable, Congress would have said so in section 523(a)(1)(C).

The Court answered that question presented in the negative, pointing out that in fact the Bankruptcy Code permits the discharge of unpaid taxes and specifically cited section 507(a)(8)(D). That section provides a priority for employment taxes “for which a return is last due, under applicable law or under any extension, after three years before the date of the filing of the petition.”

The Court further explained that "Congress did not intend to grant the IRS an absolute priority in bankruptcy for delinquent taxes, however. Instead, sections 507(a)(8) and 523(a)(1)(A) except from discharge income and *employment tax* liabilities only for those taxable years ending within three years of the filing of a debtor's bankruptcy petition." *Id.* at 1160. (Emphasis added.)

The Eleventh Circuit in *Haas II* recognized that the liability of Mr. Haas as the employer for unemployment taxes was governed by section 507(a)(8)(D) of the Bankruptcy Code. Two of the three Circuit Judges that sat on the panel in *Haas II* sat on the panel in *Haas III*. Mr. Haas conceded, however, that taxes that arose during the three-year period prior to the filing of the Chapter 11 case were not dischargeable. *Id.* at 1160. There is no suggestion in *Haas III*, however, that the unemployment taxes there were incurred under a different statute than those found to be dischargeable under subsection (D) in *Haas II*. Had the Court in *Haas III* intended to hold that section 505(a)(8)(C) was the operative section for determining the priority of unemployment taxes owed by an employer, which taxes would therefore have been nondischargeable without regard to the passage of time, such a radical departure from *Haas II* and 26 U.S.C. § 7501(a) would surely have been worthy of at least one sentence.

Defendants' reliance on *Haas III* for the proposition that Mr. Shaw's debt for unemployment taxes is not dischargeable is misplaced for another reason. Even if the *Haas III* court had opined that employment taxes are trust fund taxes so as to be nondischargeable under section 507(a)(8)(C), such a statement would have been dictum. "[D]icta is defined as those portions of an opinion that are 'not necessary to deciding the case then before us,' whereas holding is comprised both of the result of the case and those portions of the opinion necessary to that result by which we are bound. *United States v. Kaley*, 579 F.3d 1246, 1253 n. 10 (11th Cir. 2009) (quotation omitted)." *Powell v. Thomas*, 643 F.3d 1300, 1304-1305 (11th Cir. 2011).

The issue in *Haas II* was whether the bankruptcy court erred in confirming the Haas's Chapter 11 plan. That plan classified the claims for withholding taxes, employer's social security taxes and unemployment taxes as priority claims (which classification may also explain the apparent misplacement of the parenthetical). But the plan proposed to pay the priority claims as secured claims over 30 years, thereby violating section 1129(a)(9)(C) of the Bankruptcy Code. *Haas III*, 162 F.3d at 1089. Because some of the taxes Mr. Haas owed were clearly trust fund taxes, it was unnecessary to determine that unemployment taxes were trust funds in order to decide that the judgment confirming the plan should be reversed.

Similarly, the Court held that the plan was not feasible. Mr. Haas was 68 years old; yet, the plan proposed the payout of secured claims over a period of 30 years funded solely by his income as an attorney in a solo practice. "As the bankruptcy court itself recognized, Thomas Haas 'cannot be expected to practice law on a full-time basis for another 30 years.' That alone dooms the plan as infeasible." *Id.* at 1090. Because the plan was not feasible, it was not

necessary to the decision to reverse the judgment confirming the plan to determine that unemployment taxes were “trust fund” taxes.

In summary, the unemployment taxes here were payable directly by American Power based on the wages it paid its employees over each quarter. O.C.G.A. § 34-8-150. American Power was not required to collect these taxes from anyone else and certainly not from itself. Thus, the unemployment taxes were not trust fund taxes covered by section 507(a)(8)(C). Nor was Mr. Shaw required by the Employment Security Law or by American Power to collect unemployment taxes from American Power. Mr. Shaw’s duties at American Power were to file the tax returns and in effect to cause American Power to pay its unemployment taxes. Either duty alone was sufficient under O.C.G.A. § 34-8-167(e) to impose on him liability for the unpaid taxes. But his duty to pay the tax was not a duty to collect the tax, unless “pay” and “collect” are redefined to mean the same thing, in which case Dr. Johnson would surely turn over in his grave.

This Court concludes that Georgia unemployment taxes are not of the kind of taxes contemplated by 11 U.S.C. § 507(a)(8)(C). Therefore, they are not excepted from discharge under 11 U.S.C. § 523(a)(1)(A).

2. Section 507(a)(8)(D).

The defendants next assert that even if the taxes are not excepted from discharge under section 507(a)(8)(C), the taxes for the first and second quarters of 2009 are nondischargeable under sections 523(a)(1)(A) and 507(a)(8)(D). Defendant's Supplemental Brief to Motion for Summary Judgment and Trial, Doc. No. 38, p.3.

Section 507(a)(8)(D) provides priority for allowed unsecured claims of governmental units to the extent they are for-

an employment tax on a wage, salary, or commission of a kind specified in paragraph (4) of this subsection earned from the debtor before the date of the filing of the petition, whether or not actually paid before such date, for which a return is last due, under applicable law or under any extension, after three years before the date of the filing of the petition.

11 U.S.C. § 507(a)(8)(D).

As noted by Defendants, the unemployment taxes for the first and second quarters of 2009 were due on April 30, 2009 and July 31, 2009, respectively, both of which dates were within three years of April 2, 2012, when Mr. Shaw filed bankruptcy. For this reason, they contend that Mr. Shaw's debt for these taxes must be excepted from his discharge.

Defendants are once again mistaken. Section 507(a)(8)(D) applies only to employment taxes with respect to wages "earned from the debtor." The debtor is the "person or municipality concerning which a case under this title has been commenced." 11 U.S.C. § 101(13). In this case, Mr. Shaw is the debtor, not American Power. The wages giving rise to the unpaid taxes were earned from American Power, not from Mr. Shaw. Hence, section 507(a)(8)(D) is inapplicable to Mr. Shaw. *Ndosi v. State of Minn.*, 950 F.2d 1376 (8th Cir. 1991) ("On its face, the phrase 'from the debtor' operates to exclude from § 507(a)(7)(D) employment taxes on wages earned from persons other than the debtor.")

For these reasons, Defendants' Motion for summary judgment is DENIED, and because there is no other portion of section 523(a)(8) that could be the basis for concluding that the debt in question is not dischargeable, Mr. Shaw is entitled to a judgment that his debt for unemployment taxes of American Power owed to the Georgia Department of Labor is not excepted from the discharge he received on January 16, 2013 in Case No. 12-58761. That debt is discharged.

The injunctive relief sought by Mr. Shaw in his complaint is provided automatically in section 524 of the Bankruptcy Code. Hence, he needs no further relief. The Court noted above, however, the affirmative defense raised in the Defendants' answer. The Court need not determine whether the State of Georgia and its Departments could be subjected to monetary sanctions for were they to violate the discharge injunction. To the extent that the Department of Labor were to contemplate continuing efforts to collect from Mr. Shaw despite the judgment being entered in this adversary proceeding, it should be noted that state employees are subject to the discharge injunction and are not protected by the 11th Amendment to the U.S. Constitution.

The Clerk is directed to serve a copy of this Order on Plaintiff and on counsel for Defendants.

END OF ORDER